Supreme Court, U.S.
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No. 97-1666

In The

Supreme Court of the United States

October Term, 1997

KEVIN E. BRYAN and RENEE M. BRYAN,

Petitioners,

vs.

KENNETH M. CLAYTON and NEAL McCULLOH, individually and d/b/a CLAYTON & McCULLOH, a Florida general partnership,

Respondents.

On Petition for Writ of Certiorari to the State of Florida Fifth District Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Florida homeowners' association or Florida condominium association assessments are "debts" within the meaning of the federal Fair Debt Collection Practices Act?

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STATEMENT OF THE CASE

The Petitioners have misstated many key "facts" in their Petition for Writ of Certiorari. The Petitioners have presented serious allegations of egregious conduct supposedly perpetrated by the Respondents' law firm as "factual" proof of actual violations of the Fair Debt Collection Practices Act [hereinafter referred to as the "FDCPA"]. The petition relies upon the "factual" characterizations of these scandalous, unfounded and unproven allegations as the justification for this Honorable Court to accept jurisdiction of this cause. Petitioners' allegations of improper conduct are irrelevant, self-serving, and without support in the record. Petitioners have presented their unproven and highly refuted version of the "facts" to this Court as same are contained in their Complaint filed with the trial court. (A. 20). However, all of the material "facts" alleged by the Petitioners regarding violations of the FDCPA were, and always have been, denied by the Respondents. Respondents vehemently deny all of Petitioners' allegations that the Respondents' law firm violated the FDCPA with respect to the collection of the Petitioners' delinquent Florida homeowners' association assessments. Additionally, Respondents remain appalled by such improper, untrue, and impertinent distortions of the manner in which Respondents' law firm operates. In fact, despite no requirement to do so, Respondents' law firm endeavored to comply with the FDCPA. This Court ordinarily will not grant a Petition for Writ of Certiorari in order to review evidence and discuss specific facts. *See, e.g., United States of America v. Johnston*, 268 U.S. 220 (1925). Additionally, the Supreme Court ordinarily does not review questions of fact which are not necessary to a determination of the federal question. *E.g., Grayson v. Harris*, 267 U.S. 352 (1925).

The inclusion in the petition of such impertinent, unsubstantiated, and unproven "facts" is improper and

immaterial to a determination of the federal question presented by the Respondents in this Brief in Opposition. In the State of Florida Fifth District Court of Appeal, the Petitioners presented the following issue to the court:

> THE PLAIN ENGLISH MEANING OF "TRANSACTION" AND "PERSONAL, FAMILY OR HOUSEHOLD PURPOSES" COMPELS THE CONCLUSION THAT HOMEOWNERS' ASSOCIATION DUES AND ASSESSMENTS ARE "DEBTS" UNDER THE FDCPA AND THE FLORIDA ACT.

Yet, the Petitioners have presented the following significantly and materially different question to this Court:

> Are third party collection agents exempt from having to comply with the federal Fair Debt Collection Practices Act ("FDCPA") prohibitions against overreaching, intimidation, misrepresentation, etc. when they are attempting to collect condominium and homeowner association dues and assessments and ancillary charges, or are such items "debts" under the FDCPA?

A comparison of the issue presented to the State of Florida Fifth District Court of Appeal and the question presented to this Court clearly evidences the Petitioners' improper attempt to interject unresolved, unlitigated, and unproven factual issues into what the parties and the courts have, to this point, addressed as a question of law.

Respondents, in this Brief in Opposition, have properly identified that the federal question presented to this Court is,

and always has been, a question of law and legal interpretation. As clearly stated by the trial judge, The Honorable James C. Hauser, in his Order Granting Defendants' Motion for Summary Judgment and Motion to Dismiss dated May 7, 1996, ". . . the threshold issue is whether the collection these attorneys were trying to make was of a 'debt' within the definition of the federal and state acts." (A. 9). The State of Florida Fifth District Court of Appeal succinctly stated:

> [i]n this appeal we are asked to decide whether maintenance assessments owed to the appellants' homeowners' association are "debts" for purposes of the Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act.

(A. 1).

The trial court held in the instant case that the assessments sought to be collected are not "debts" within the meaning of the FDCPA. (A. 12). The trial court, having held that the assessments are not "debts", granted summary judgment in favor of the Respondents due to the Petitioners' failure to state a cause of action. (A. 7-13). Thereafter, Final Judgment was entered in favor of the Respondents. (A. 14-15). The State of Florida Fifth District Court of Appeal concurred with the trial court and held that Florida homeowners' association and Florida condominium association assessments are not consumer "debts" within the purview of the FDCPA. (A. 2). The Florida Supreme Court, without rendering an opinion, declined to exercise its discretionary jurisdiction to review the decision of the State of Florida Fifth District Court of Appeal. (A. 18).

This Court should be mindful that because the federal question presented by the Respondents in this Brief in

Opposition has, to this point, been addressed as a question of law, there has **never** been a trial to conclusively establish any "facts" related to the Petitioners' **allegations** of violations of the FDCPA by Respondents' law firm. Furthermore, it was held by the trial court in the instant action that Respondents' law firm is not a "debt collector" within the meaning of the FDCPA. (A. 12). Pursuant to the FDCPA, the term "debt collector"

> . . . means any person who uses any instrumentality of interstate commerce or the mails in any business the *principal purpose of which is the collection of any debts*, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. * * * The term does not include —
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (I) is incidental *to a bona fide fiduciary obligation*. . . . [emphasis supplied] [See (A. 57-58) for complete text]

15 U.S.C.A. § 1692(e)(6).

The Seventh Circuit in the case of *Newman v. Boehm, Pearlstein & Bright*, 119 F.3d 477, 482 n.3 (7th Cir. 1997) intimated that a defense to the complaint may exist if the law firms in that case were not "debt collectors" as defined in the FDCPA. Therefore, the law firms in *Newman* may yet avoid being subject to the FDCPA. The Seventh Circuit remanded the case to the trial court for further proceedings consistent with its holding that the assessments were "debts." However, the Seventh Circuit has ostensibly left the door open for a determination of whether a law firm (such as the Respondents'

law firm in the instant action) is a "debt collector" when collecting homeowners' association and condominium association assessments.[1]

As was the case in *Newman*, if this Court determines in the instant action that Florida homeowners' association and Florida condominium association assessments are "debts" within the meaning of the FDCPA, this case would have to be remanded to the trial court for further proceedings consistent with this Court's mandate. Assumedly, this Court would not address the "debt collector" issue because there is no conflict on this issue between *Newman* and *Bryan* which would make this issue ripe for consideration by the Court.

Therefore, the worst case scenario for the Respondents would be that the instant case would be remanded for further litigation to address the legal and factual issue of whether the Respondents' law firm is a "debt collector" as defined by the FDCPA and also to determine all of the factual issues present in the instant case.

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1. *Cf.*, *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995), *aff'd*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 712 (1996) [holding that a corporate manager for a condominium association owed a fiduciary duty to the association to collect delinquent assessments, and therefore the corporate manager was not a "debt collector"]

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED BY THE PETITIONERS IN THEIR PETITION FOR WRIT OF CERTIORARI HAS NOT BEEN PRESERVED FOR REVIEW BY THIS COURT.

Petitioners present the following question for review in their Petition for Writ of Certiorari:

> Are third party collection agents exempt from having to comply with the federal Fair Debt Collection Practices Act ("FDCPA") prohibitions against overreaching, intimidation, misrepresentation, etc. when they are attempting to collect condominium and homeowner association dues and assessments and ancillary charges, or are such items "debts" under the FDCPA?

The issue of whether the Respondents' law firm is "exempt" from the FDCPA goes directly to the question of whether the Respondents' law firm is a "debt collector" as defined in 15 U.S.C.A. § 1692a(6). (A. 57-58). As intimated by the Seventh Circuit in *Newman*, the issue of whether a law firm such as the Respondents' law firm is a "debt collector" has not been decided nor has it even been addressed by *any* of the few courts who have addressed the issue of applying the FDCPA to the collection of homeowners' association and condominium association assessments.

Importantly, the question of whether the Respondents' law firm is a "debt collector" has not been preserved below by the

Petitioners. Petitioners have never presented for review on appeal in the lower courts the question of whether the Respondents' law firm is a "debt collector."[2] This is true even though the trial court in the instant *Bryan* case specifically held that the Respondents' law firm ". . . may not be considered 'debt collectors' . . ."

The significance of the "debt collector" question cannot be underestimated. This Court should be mindful of the fact, as the Seventh Circuit recognized in *Newman*, that the question of whether homeowners' association and condominium association assessments are "debts" within the meaning of the FDCPA is **only one-half of the issue**. In fact, whether or not law firms collecting such assessments are "debt collectors" has yet to be ruled upon by any court other than the trial court in the instant *Bryan* case. For the FDCPA to apply to Respondents' law firm, the assessments sought to be collected must be "debts" *AND* the Respondents' law firm must be a "debt collector." The single issue ruled upon by the *Newman* court was whether the assessments are "debts." *Newman*, therefore, only addressed one-half of the issue. The decision in *Newman* is not in conflict with the instant *Bryan* decision because only in *Bryan* has the court held that Respondents' law firm is not a "debt collector." No other court has ruled or even analyzed the "debt collector" issue in the context of Florida homeowners' association and Florida condominium association assessments.

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2. In addition to the question presented to the State of Florida Fifth District Court of Appeal previously identified at page two (2) of this Brief in Opposition, the Petitioners presented as a second issue the following: "*The precedents relied upon by the trial court are inapplicable, distinguishable, or ill-conceived.*" These were the only two issues submitted by the Petitioners for consideration by the State of Florida Fifth District Court of Appeal.

The Court lacks subject matter jurisdiction over the instant Petition for Writ of Certiorari because there is no conflict between *Newman* and *Bryan* on the federal question of whether Respondents' law firm is a "debt collector" as defined by the FDCPA. Additionally, the "debt collector" issue has not been preserved for appeal. Lastly, because the "debt collector" issue has not been resolved nor even addressed in the prior federal cases, any opinion expressed on this issue by this Court would be purely advisory in nature.

II.

THE DECISION IN *NEWMAN* AND THE INSTANT *BRYAN* DECISION ARE NOT IN CONFLICT BECAUSE THE DECISIONS RENDERED IN THESE CASES ARE LIMITED TO THEIR RESPECTIVE FACTS.

In the State of Florida, homeowners' associations and condominium associations are creatures of statute.[3] The purpose of and the uses to which "assessments" may be spent are strictly limited by the Florida Statutes and the governing documents creating the association. In reaching its decision in the instant *Bryan* case, the State of Florida Fifth District Court of Appeal necessarily interpreted the FDCPA definition of "debt" and "personal, family, and household purposes" within the confines of the Florida Law.

In the case of *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997), the Seventh Circuit expressly examined Illinois law in reaching its conclusions that, in Illinois,

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3. In Florida, homeowners' associations are governed generally by Chapter 617, Fla. Stat., and are specifically governed by §§ 617.301-617.312, Fla. Stat. (*i.e.* the "Florida Homeowners' Association Act"). Condominiums are governed by Chapter 718, Florida Statutes (*i.e.* the "Florida Condominium Act.")

homeowners' association and condominium association assessments are debts under the FDCPA. *Id.* at 481. Specifically, the Seventh Circuit stated:

> . . . the Riters became bound by the Declaration of Covenants, Conditions, and Restrictions of their homeowners association, which required the payment of regular and special assessments imposed by the association. The Newmans similarly became obligated upon the purchase of their condominium unit to pay any assessments pursuant to the condominium ownership declaration and the by-laws of their association, **as well as under an Illinois statute addressed to condominium property.**

(Emphasis supplied.) *Newman*, 119 F.3d at 481.

As previously stated, homeowners' associations and condominium associations in Florida are creatures of statute. In Illinois, ostensibly, only condominium associations in Florida are statutorily governed. Furthermore, there is a very strong likelihood that the governing documents of the homeowners' association in the instant *Bryan* case and the governing documents for the associations in the *Newman* case are vastly different.

Therefore, because the Laws of Florida and the Laws of Illinois may differ on the use and purposes of assessments, and because the specific governing documents of the associations in *Bryan* and *Newman* are not identical, and may not even be similar, the decisions in *Bryan* and *Newman* should be limited to their specific facts and their specific jurisdictions. As such, there is no conflict between the *Bryan* decision and the *Newman* decision which vests jurisdiction over this Petition for Writ of Certiorari with this Court.

III.

THE JUDGMENT ENTERED BY THE STATE OF FLORIDA FIFTH DISTRICT COURT OF APPEAL WAS NOT IN CONFLICT WITH *NEWMAN* WHEN IT WAS "RENDERED" PURSUANT TO STATE LAW.

The State of Florida Fifth District Court of Appeal issued its written opinion holding in favor of the Respondents on May 9, 1997. (A. 1). After the entry of this written opinion, the Petitioners filed with the State of Florida Fifth District Court of Appeal their Motion for Clarification, Rehearing, Rehearing En Banc, and Certification, and for Ancillary Relief. This motion for rehearing was denied by Order of the Court dated June 25, 1997. (A. 17). Therefore, as of June 25, 1997, the judgment was "final" for the purposes of appeal to the Florida Supreme Court. The State of Florida Fifth District Court of Appeal was left with only the ministerial act of issuing its mandate in order to conclude the case. *See Board of Commissioners v. Lucas*, 93 U.S. 108 (1876).

A judgment is "rendered", pursuant to the Florida Rules of Appellate Procedure, when the signed, written order is filed with the Clerk.[4] However, rendition of the judgment is stayed pending the disposition of a timely filed motion for rehearing. Therefore, in the instant cause, the judgment of the State of Florida Fifth District Court of Appeal was "rendered" on June 25, 1997, upon the entry of the Order of the Court denying Petitioners' Motion for Clarification, Rehearing, Rehearing En Banc, and Certification, and for Ancillary Relief.[5] (A. 17).

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4. Rule 9.010(h), Fla. R. App. Pr.

5. *Cf. Eldred v. Reber*, 639 So. 2d 1086 (Fla. 5th DCA 1994) [holding that a statute of limitations begins to run from the date the appellate court "renders" its decision rather than from the date the appellate court issues its mandate].

It is well settled law in Florida that appellate courts are to apply the law as it exists at the time the appellate decision is rendered. *E.g., Lowe v. Price*, 437 So. 2d 142 (Fla. 1983). In reaching its decision in the instant cause, the State of Florida Fifth District Court of Appeal cited to an unbroken line of federal decisions which held that homeowners' association and condominium association assessments are not "debts" within the meaning of the FDCPA. (A. 2).

The Petitioners urge this Court to accept jurisdiction based upon an alleged conflict between the instant *Bryan* decision rendered by the State of Florida Fifth District Court of Appeal and the case of *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997). However, the "judgment" in *Newman* was not "entered" until July 2, 1997, which date is **after** final rendition of the *Bryan* judgment.[6] Furthermore, the judgment in *Newman* was not final for the purposes of the issuance of a mandate until the motion for rehearing in that case was denied by the Seventh Circuit on September 12, 1997.[7]

The State of Florida Fifth District Court of Appeal decision was "final" for purposes of appeal to this Court on June 25, 1997. *See, e.g., Market Street R. Co. v. Railroad Commission*, 324 U.S. 439 (1945). The decision by the *Newman* court was not "final" until September 12, 1997. Accordingly, the Seventh Circuit's decision in *Newman* is not in "conflict" with the instant decision in *Bryan* due to the fact that the *Bryan* decision was, by state law, **rendered** and final **prior** to the Seventh Circuit's decision in *Newman*.

Therefore, the State of Florida Fifth District Court of Appeal has not ". . . decided an important federal question in a way

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6. Rule 36, Federal Rules of Appellate Procedure.

7. Rules 40 and 41, Federal Rules of Appellate Procedure.

that conflicts with the decision of another state court of last resort or of a United States court of appeals."[8] This is true because at the time the *Bryan* decision was rendered pursuant to state law, the decision in *Newman* was not final pursuant to the Federal Rules of Appellate Procedure.

Additionally, this Court should reject certiorari review because a resolution of the alleged conflict would be a retroactive application of the law to the decision in *Bryan* because the *Bryan* decision was final pursuant to state law prior to the judgment in *Newman*. Therefore, because the instant *Bryan* decision is "rendered" and "final" pursuant to applicable state law, acceptance of the Petition for Writ of Certiorari and the subsequent rendition of a decision by this Court would be purely advisory in nature and would not alter or amend the result reached by the Florida State Courts.

IV.

THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN IS UNTIMELY.

As previously argued in this Brief in Opposition, the decision of the State of Florida Fifth District Court of Appeal was "rendered" on June 25, 1997, the date when the State of Florida Fifth District Court of Appeal entered its Order of the Court denying Petitioners' Motion for Clarification, Rehearing, Rehearing En Banc, and Certification, and for Ancillary Relief. (A. 17). Petitioners' Motion to Stay or Recall Mandate is not an authorized motion which tolls rendition of the judgment.[9]

8. Rule 10(b), Rules of the Supreme Court of the United States.

9. The commentary to Rule 9.020, Fla. R. App. Pr., states that "[m]otions that postpone the date of rendition have been narrowly limited to prevent deliberate delaying tactics. To postpone rendition the motion must be timely, authorized, and one of those listed." A motion to stay or recall mandate is not listed as an "authorized motion" which would toll rendition of the judgment.

Petitioners Motion to Stay or Recall Mandate postponed only the ministerial act of the issuance of the court's mandate, not the rendition of the judgment. If nothing more than a ministerial act remains to be done, the decree is regarded as concluding the case and is immediately reviewable by the Court. *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62 (1948).

The Respondents argued in their Brief on Jurisdiction filed with the Florida Supreme Court that the Petition for Discretionary Review was untimely filed more than thirty days after a rendition of the judgment. Therefore, the Florida Supreme Court may very well have based its denial of the Petition for Discretionary Review on state law timeliness grounds. When the highest court of the state delivers no opinion and it appears that the judgment might have rested upon non-federal grounds, the Court ordinarily will not accept certiorari jurisdiction. *Stembridge v. State of Georgia*, 343 U.S. 541 (1952).

As a prerequisite to granting the instant Petition for Writ of Certiorari, this Court should seek a ruling or clarification from the Florida Supreme Court to determine, under state law, whether or not a motion to stay or recall mandate is an "authorized motion" which would toll the time period for seeking discretionary review. If a motion to stay or recall mandate does not toll the time period for seeking discretionary review, then the instant Petition is untimely and this Court lacks subject matter jurisdiction.[10]

The decision of the State of Florida Fifth District Court of Appeal was rendered on June 25, 1997. The instant Petition for Writ of Certiorari was untimely filed more than ninety (90) days after a rendition of the judgment of the State of Florida Fifth District Court of Appeal.

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10. Rule 12, Rules of the Supreme Court of the United States.

V.

THE ISSUE PRESENTED IN THIS CAUSE IS NOT SUFFICIENTLY RIPE FOR REVIEW BY THE COURT.

The Petitioners have noted that

> [t]o date, *Newman* is the first federal appellate court (and only the second appellate court anywhere, *Bryan* being the first) to expressly construe the FDCPA in the context of dues and assessments for community associations.

(Pet. 8-9). As noted by the State of Florida Fifth District Court of Appeal, the FDCPA ". . . has no plain meaning and its intent is anything but clear." (A. 2).

This Court should await further clarification and/or interpretation from other courts of appeal in order that this Court should benefit from a variety of views, rather than only the two views presented by *Newman* and *Bryan*. Furthermore, the resolution of the federal question presented by the Respondents in this Brief in Opposition should be accomplished legislatively rather than judicially. In fact, according to the March 1998 issue of the Community Associations Institute **Capitol Connection** Newsletter of the Government & Public Affairs Department, the Community Associations Institute [hereinafter referred to as "CAI"] has drafted legislative amendments to the FDCPA in order to clarify the federal question presented by the Respondents in this Brief in Opposition. The proposed CAI legislation would exempt homeowners' association assessments and condominium association assessments from the purview of the FDCPA. As stated in the newsletter, CAI is currently meeting with members of the United States House and Senate Banking Committees to

solicit support for the amendments proposed by CAI. This Court should await further developments in the case law or additional legislative clarification prior to judicially legislating the federal question presented herein.

The previously unbroken line of cases which have squarely addressed the federal question presented herein, and upon which the *Bryan* court relied, dates all the way back to *Archer v. Beasley*, No. 90-2576 (CSF), 1991 WL 34889 (D.N.J. March 5, 1991). The Seventh Circuit in *Newman* was the first court to reject this unbroken line of federal cases which arose from *Archer*. Until *Newman*, Congress had no federal question to legislatively clarify because there was no disparity in the judicial interpretation given to the federal question presented in the instant cause. Only now, after *Newman*, is there a need for Congressional involvement to clarify the federal question. This Court should await the anticipated legislative reaction to *Newman* prior to judicially legislating a resolution of the federal question presented in the instant cause.

CONCLUSION

This case does not merit review by the Court. For the foregoing reasons, the Court should deny the Bryans' Petition for Writ of Certiorari.

Respectfully submitted,

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